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November 26, 2002

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Provision of In-Region, InterLATA Services in California; WC Docket No. 02-306 – Ex Parte Filing

Dear Ms. Dortch:

This *ex parte letter* is submitted on behalf of AT&T Corp. at the request of Commissioner Martin, and responds to questions raised at an *ex parte* meeting with Commissioner Martin on Friday, November 22, 2002.[1] In particular, this letter responds to questions concerning the significance of (1) SBC Pacific's failure to comply with its obligation to file an application that was complete when filed with respect to full implementation of its checklist duty to provide local number portability, and (2) the California Public Utilities Commission's ("CPUC") finding that granting SBC's request for interLATA authorization in California would not be in the public interest.

I. LOCAL NUMBER PORTABILITY

SBC Pacific's application is deficient on its face. The CPUC found that SBC Pacific had not yet fully implemented its local number portability requirements under Checklist Item 11. Rather than wait to file its application until the CPUC had verified that SBC Pacific had, in fact, corrected the customer outages that concerned the CPUC, SBC filed this application the day after the CPUC issued its finding of non-compliance. SBC now attempts in its reply comments to supplement the record with improper late-filed evidence.

[1] A supporting declaration of Eva Fettig concerning shared transport also is attached.

This application therefore differs fundamentally from other applications where the Commission has exercised its discretion to consider late-filed evidence. In prior applications, the state commission had already verified full implementation of the checklist, and this Commission decided that it could accept late-filed evidence in response to narrow issues that CLECs raised during the course of the application. Here, in sharp contrast, the BOC applicant filed its application knowing that the state commission had found a failure to fully implement the competitive checklist. SBC's belated attempts to cure this checklist problem starkly violate the rules that have governed every Section 271 application that has come before this Commission, that this Commission has repeatedly reaffirmed in several procedural and substantive orders, and that the Commission has found are rooted in the "unique scheme of accelerated and consultative agency review" that Congress imposed.[2] To approve this application in these circumstances would sound the death-knell of the complete-when-filed rule. It would be an open invitation to every BOC to file its application as soon as it thought it was within 90 days of fully implementing the competitive checklist, regardless of whether the state commission thought the job was complete, and regardless of whether the state or commenters would be able to verify and comment upon the BOC's subsequent claims of checklist compliance. There is no reason why the Commission should take this unprecedented step, and every reason not to.

The CPUC refused to verify compliance with SBC Pacific's local number portability obligations because of a basic defect in SBC Pacific's manual processing systems. The CPUC found that SBC Pacific's manual processes for number portability had "caused an unexpected loss of dial tone for a high percentage of AT&T's end-user customers (primarily residential)," and that as a result "CLECs do not have certain knowledge of when SBC Pacific will disconnect certain customers, and cannot maintain the integrity of these end-users' dial tones."[3] To fix this problem, the CPUC concluded that "[m]echanization of the NPAC check is crucial," because it would prevent loss of dial tone by "mechanically delay[ing] a Pacific disconnect if the activation of the NPAC porting request has not been completed by the due date."[4] CLECs demanded that SBC Pacific fix the problem more than two years ago, and the CPUC found that SBC Pacific's continuing delay in implementing a mechanized enhancement to the NPAC check "presents a critical barrier to entry for the CLECs."[5] Given all this, it is not surprising that the CPUC concluded that "Pacific has not satisfied the compliance requirements

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[2] *Michigan 271 Order* ¶ 50.

[3] Decision Granting Pacific Bell Telephone Company's Renewed Motion For An Order That It Has Substantially Of The Telecommunications Act Of 1996 And Denying That It Has Satisfied § 5 709.2 Of The Public Utilities Code, CPUC Decision 02-09-050 (September 19, 2002) ("*CPUC 2002 271 Decision*") at 202, 206, 296 (Finding of Fact 253).

[4] *Id.* at 205-206, 296 (Findings of Fact 250-251).

[5] *Id.* at 206, 314 (Conclusion of Law 84).

for Checklist Item 11 until it implements and verifies this essential element of local number portability in California, and we will not verify compliance until Pacific does so."[6]

Because SBC Pacific still had not fixed the problem as of the date comments on its FCC application were due, the CPUC confirmed in its comments on this application that SBC Pacific still "failed to comply with checklist item xi regarding number portability."[7] To this day, the CPUC has not verified full checklist compliance, and it cannot reasonably do so at this stage of the proceedings and still afford this Commission sufficient time to consider the CPUC's views and evidence and the comments and evidence that any other interested parties may wish to submit in response.[8] SBC Pacific created this problem. It did not attempt to implement the mechanized NPAC check until September 30, 2002 – 11 days after it filed its Application. And it was not until November 1, 2002 – six weeks after filing its Application and just before *reply* comments were due on this application – that SBC Pacific filed with the CPUC a "Supplemental Notice of Compliance" that purported to include the 30 days of operational data that the CPUC had required regarding the implementation of the mechanized NPAC check. Three days later, in its reply comments in this proceeding, SBC Pacific cited its implementation of the new functionality on September 30, and included the data that it had filed on November 1 with the CPUC "demonstrating the success of that implementation," as evidence that it "satisfies Checklist Item 11."[9] Of course, at that point the CPUC had had no opportunity to evaluate SBC's new evidence, let alone any response the CLECs might advance as to their comments on what SBC deemed to show compliance or on their own experience. Thus, for example, the CPUC has not had an adequate opportunity to evaluate AT&T's contention that SBC Pacific's "Supplemental Notice of Compliance" provides no basis for finding that the mechanized NPAC check is effective, because it fails to present *any* data regarding the occurrence and duration of outages under the new functionality – even though the CPUC required implementation of the mechanized NPAC check in order to prevent the outages that were occurring under SBC Pacific's previous manual processes. The failure of SBC Pacific to provide such data is particularly stark, in the face of AT&T's evidence that its customers have experienced outages on 35 LNP orders due to deficiencies in SBC's new mechanized processes.[10]

Because SBC Pacific's "Supplemental Notice" – even if it could reasonably be considered by this Commission -- does not demonstrate full implementation of its local number portability obligations, the Commission cannot find that SBC has met checklist item 11. But

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[6] *Id.* at 314 (Conclusion of Law 86); *see also id.* at 206-207.

[7] Letter from Ellen S. Levine (Counsel for the CPUC) to Marlene H. Dortch, dated October 9, 2002, at 1.

[8] *Cf.* Michigan 271 Order ¶ 51.

[9] SBC Reply at 65. *See also* E. Smith Reply Aff. ¶¶ 8-9 & Att. A (November 1 "Supplemental Notice of Compliance").

[10] The recent outages will be discussed in the Supplemental Declaration of Walter W. Willard, which AT&T will be filing shortly; *see also* AT&T Reply at 37; Willard Reply Decl. ¶¶ 18-24.

SBC's stark violation of the complete-when-filed rule in failing to submit evidence of checklist compliance until after it filed its application provides a separate and compelling reason to find non-compliance.

The Commission has repeatedly "emphasize[d] the requirement that a BOC's section 271 application must be complete *on the day it is filed.*"[11] Given the complete-when-filed rule, and the requirement that a Section 271 applicant have "fully implemented" the checklist before the Commission may approve an application, a BOC's application must show that it has already satisfied each item of the checklist *at the time it chooses to file its application.* By requiring the BOC to include all of the facts relevant to 271 compliance in its opening filing, the rule is designed "to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commissions can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record."[12]

By waiting until its reply comments to provide evidence that purports to show (although it does not) that it has fixed the outages problem, SBC Pacific compels this Commission to resolve an evidentiary dispute in the limited time left in this proceeding without the benefit either of the state commission's evaluation of all the evidence or the comments thereon of interested parties. In the past, this Commission has resisted taking on such a role, noting that it "has neither the time nor the resources to evaluate a record that is constantly evolving."[13] Instead, the Commission has relied heavily on state commissions (which are not subject to such statutory time deadlines) to develop a "comprehensive factual record" regarding checklist compliance.[14] SBC Pacific, however, has obstructed the CPUC's efforts to develop of such a record. By including its purported proof of implementation of the mechanized NPAC check only in its reply comments, SBC Pacific has denied the CPUC the opportunity to investigate SBC Pacific's claims of implementation and the commenters' evidence of continuing outages within the time allotted by this Commission's rules for filing comments. This tactic is particularly improper where, as here, the state commission has found non-compliance with the checklist item. As the Commission long ago observed, the BOC controls the timing of its

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[11] *See, e.g., Michigan 271 Order* ¶ 50; *South Carolina 271 Order* ¶ 38; *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, DA 01-734 ("*271 Filing Requirements*"), released March 23, 2001, at 3, 5.

[12] *E.g., Rhode Island 271 Order* ¶ 7.

[13] *Michigan 271 Order* ¶ 54.

[14] *See, e.g.*, *271 Filing Requirements* at 8 ("given our 90-day statutory deadline, this Commission looks to state commissions to resolve factual disputes wherever possible"); *Michigan 271 Order* ¶ 30 (development of a "comprehensive, factual record [by the state commission] concerning BOC compliance with the requirements of section 271 is "all the more important in view of the strict, 90-day deadline for Commission review of section 271 applications. . . . We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record *to be of great importance to our review of section 271 applications*") (emphasis added).

application.[15] The BOC therefore should wait to file until the state commission has verified full checklist compliance. SBC's refusal to follow this rule here is all the more inexcusable because it was Pacific that long-delayed implementing the mechanized NPAC check.[16]

SBC Pacific's only response is that this Commission has not previously required a mechanized NPAC check to establish compliance with Item 11 of the checklist.[17] That response has no merit, for two reasons. First, this Commission has never before been faced with a state commission's finding comparable to California's that a BOC's manual processes caused customer outages and required implementation of a mechanized process. SBC Pacific used manually intensive processes (1) to handle any requests from CLECs to cancel or reschedule an LNP order when (as commonly occurs) customers advised the CLECs on the day of the original appointment that they wished to cancel or reschedule, and (2) to prevent the originally-scheduled disconnection from occurring in such circumstances,[18] all of which "present[ed] a critical barrier to entry to CLECs," because they denied CLECs both the knowledge as to when SBC Pacific would disconnect its customers, and the ability to "maintain the integrity of [their] end-users' dial tones."[19] This Commission has routinely required proof of mechanized processes where, as here, manual processes have proven inadequate to provide full implementation of checklist obligations, and there is no reason not to enforce that principle here.[20]

Second, it simply is not true that other BOCs have implemented local number portability through purely manual processes. Some BOCs (*e.g.*, BellSouth) have used automated processes, and others have demonstrated to the satisfaction of their state commission that their manual processes caused no appreciable harm to customers or competitors. Thus:

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[15] *Michigan 271 Order* ¶ 55.

[16] *CPUC 2002 271 Decision* p. 205-206; see also Willard Decl. ¶¶ 77-83.

[17] Application at 75-76; E. Smith Aff. ¶¶ 15-16; SBC Reply at 65.

[18] *See* Willard Decl. ¶¶ 62-76. For example, when the customer cancelled or rescheduled the appointment before 1:00 p.m. on the date of installation, SBC Pacific's procedures required the CLEC to submit a supplemental order, which fell out for manual processing by SBC Pacific personnel. *Id.* ¶¶ 70-71. When the customer cancelled or rescheduled the appointment after 1:00 p.m. on the date of installation, the CLEC was required to make a verbal request to SBC Pacific's Local Operations Support Center, and then to send a follow-up fax to the center – which then manually reviewed the fax and submitted it to the Recent Change Machine Administration Center. *Id.* ¶¶ 72-75.

[19] *See CPUC 2002 271 Decision* at 296 (Finding of Fact 253); *id.* at 314 (Conclusion of Law 84).

[20] The Commission has made clear that manual processes may be appropriate under the checklist only "in limited instances," and that excessive reliance on manual processes – especially for routine transactions – 'impedes the BOC's ability to provide equivalent access." *Second Louisiana 271 Order* ¶ 110; *South Carolina 271 Order* ¶ 107; *Michigan 271 Order* ¶ 178. In the context of flow-through, for example, the Commission has denied previous applications of BOCs that relied heavily on manual processing of orders, on the ground that "it is difficult to see how equivalent access could exist when [the BOC] processes a significant number of orders from competing carriers manually," because "it is virtually impossible for orders that are processed manually to be completed in the same time as orders that flow through electronically." *See South Carolina 271 Order* ¶ 107; *Michigan 271 Order* ¶ 196.

- In its *New York 271 Order*, the Commission rejected claims that Bell Atlantic was activating number portability prematurely and preventing CLECs' customers from receiving calls, because the claims were simply "unsupported, conclusory obligations that do not warrant a finding of noncompliance" with Item 11. The Commission noted that "the New York Public Service Commission conclude[d] that Bell Atlantic has satisfied this checklist item."[21]

- Similarly, in the Texas 271 proceeding, CLECs contended that SWBT had failed to update its switch translations properly (thereby preventing completion of calls to CLEC customers with a ported number) and delayed customers' orders due to an outage in its local number portability database. The Commission found the claims to be "anecdotal and unsupported by any persuasive evidence," and cited the finding of the Texas PUC that SWBT had satisfied Item 11.[22]

- In its order approving BellSouth's Section 271 application for Georgia and Louisiana, the Commission rejected AT&T's claim that BellSouth was not complying with Item 11 because of loss of inbound service calling attributable to problems with BellSouth's number portability process. The Commission noted that although AT&T believed that the source of the problem was BellSouth's failure to perform translation work on its switch (where the switch cannot implement an automatic trigger) at the time the number is ported, BellSouth showed that "for the *vast majority of its orders*, the LNP Gateway System *automatically* issues a trigger order with a zero due date, *which does not require manual intervention*, and meets or exceeds any national standards for number portability."[23] The Commission also noted that BellSouth, in response to AT&T's claims, had established specific project managers to ensure the accurate handling of conversions of large or complex orders. However, the Commission found it even "more important" that "the Georgia commission considered AT&T's allegation with respect to this issue and concluded that BellSouth's approach is 'a reasonable one.'" The Commission therefore determined that the allegations of AT&T did not indicate a systemic failure in BellSouth's provision of number portability, "[g]iven BellSouth's evidence, along with the prior determination of the Georgia commission."[24]

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[21] *New York 271 Order* ¶¶ 369, 371.

[22] *Texas 271 Order* ¶¶ 371-372.

[23] *Georgia/Louisiana 271 Order* ¶ 261 (emphasis added).

[24] *Id.* In the *Georgia/Louisiana 271 Order*, the Commission also rejected a claim by AT&T that BellSouth frequently (and erroneously) assigned to a new BellSouth customer a telephone number that previously had been ported to an AT&T customer. The Commission concluded that based on the evidence, "the number reassignment problems experienced by AT&T are *de minimis* and isolated, and do not warrant a finding of noncompliance for this checklist item." *Id.* ¶ 260. The Commission noted that BellSouth had implemented an interim manual solution to the problem in January 2001 (*i.e.*, before it filed its application) and was pursuing a software solution. *Id*.

- The Commission relied upon the *Georgia/Louisiana 271 Order* in rejecting a challenge to BellSouth's compliance with Item 11 in BellSouth's ensuing five-State application for 271 authority. One commenter asserted that "in a number of instances, despite timely notification that a customer has postponed its loop cutover request, BellSouth will disconnect the line prematurely, resulting in a loss of service." The Commission again cited the evidence that BellSouth's LNP Gateway system automatically issued a trigger order with a zero due date, without manual intervention, for the "vast majority" of orders. Additional evidence by BellSouth showed that it was processing 92 percent of LNP orders mechanically. The Commission concluded that BellSouth complied with checklist item 11 "[g]iven BellSouth's evidence of its compliance and the relatively small number of occurrences [of manual intervention] cited by BellSouth."[25]

- Most recently, in its *Virginia 271 Order*, the Commission found that Verizon complied with Item 11 notwithstanding CLEC contentions of outages during cutovers, because the CLECs had "provided no factual information to show how common this situation might be, nor do they even provide anecdotal evidence of specific incidents. As a result, that evidence is insufficient to show systemic or intentional discrimination on Verizon's part."[26]

Finally, the Commission's recent *Virginia Arbitration Order* – which is the only specific Commission order cited by SBC Pacific[27] – does not establish any new rule that BOCs need not mechanize NPAC checks to fully implement the checklist. Rather, the Commissoin merely concluded that Verizon was not required to implement a mechanized NPAC, because Verizon (unlike SBC Pacific) presented undisputed evidence that "costly changes would be necessary to implement the requested functionality" (particularly since Verizon's ordering and provisioning systems do not currently interact with the system that receives NPAC "activate" messages),[28] and because the evidence of Verizon's performance (again unlike SBC Pacific's) did not show "that such changes are warranted, or that the current process of competitive LECs sending supplemental LSRs is an unreasonable or unworkable method of ensuring that outages do not occur."[29] Unlike Verizon's systems, SBC Pacific's ordering and provisioning systems currently interact with its system that receives NPAC activate messages. Willard Opening Decl. ¶ 79. And more fundamentally, the record here shows – and the CPUC has confirmed -- that Pacific's manual processes did not prevent outages.[30]

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[25] *Five-State 271 Order* ¶ 263.

[26] *Virginia 271 Order* ¶ 192.

[27] *See* E. Smith Aff. ¶ 18 & n.16.

[28] *Virginia Arbitration Order* ¶¶ 565-566.

[29] *Id.* ¶ 566.

[30] *See* 47 U.S.C. § 271(c)(2)(B)(xi).

The Commission's previous 271 decisions and the *Virginia Arbitration Order* thus establish both that other BOCs such as BellSouth employ mechanized NPAC checks, and that a mechanized NPAC check has not been required only where, unlike here, the BOC has proven to the satisfaction of the state commission that its processes do not cause undue customer outages. Because SBC Pacific could not make the latter showing, the checklist requires implementation of a mechanized NPAC check and proof that it has solved the problem.

In sum, SBC Pacific's initial application lacked the evidence and state-commission verification needed to demonstrate full implementation of checklist item 11. For that reason alone, its application should be denied.[31] Approval under the current circumstances would be erroneous and would effectively destroy the "complete-when-filed" rule. If SBC is permitted to ignore the rule for its California application, every other BOC will feel free to ignore it as well. Neither Congress nor the Commission has sanctioned such a race-to-the-bottom, and the Commission should not authorize it here.

II. PUBLIC INTEREST – ROLE OF STATE COMMISSIONS

Commissioner Martin also asked whether the CPUC was unique in providing an assessment of whether granting SBC Pacific's application at this time would be in the public interest, and what the significance would be of having this Commission overrule such a finding. The Commission invited the States to develop a record on and address public interest issues as early as its *Michigan 271 Order,* has stated that it will give weight to State findings on those issues in a manner comparable to that for checklist verification, and has given weight to the states' assessment of public interest issues.[32] The Commission has examined numerous factors to determine whether there is an "adequate factual record" to permit a finding that interLATA authorization is in the public interest,[33] has assessed whether there a pattern of "discriminatory or anti-competitive conduct" or of a failure "to comply with state and federal telecommunications regulations,"[34] and has given weight to state assessments of whether the BOC has "undertaken all actions necessary to assure that its local telecommunications market is,

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[31] Section 271(d)(3)(A) states that the Commission "shall not approve" a Section 271 application unless it finds, *inter alia*, that the applicant "has *fully implemented the competitive checklist.*" *See* 47 U.S.C. § 271(d)(3)(A)(i) (emphasis added); *Virginia 271 Order*, App. C, ¶ 3; *Five-State 271 Order*, App. H, ¶ 3; *Delaware/New Hampshire 271 Order*, App. F, ¶ 3; *Georgia/Louisiana 271 Order*, App. D, ¶ 3; *Rhode Island 271 Order*, App. D, ¶ 3. *See, e.g., Second Louisiana Order* ¶¶ 51-52 ("the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party comments on a particular checklist item. . . . With respect to each checklist item, we first determine whether [the applicant] has made a *prima facie* case that it meets the requirements of the particular checklist item").

[32] *See, e.g.., Michigan 271 Order* ¶¶ 30, 34-35; *New York 271 Order* ¶¶ 429, 433, 436, 440; *Texas 271 Order* ¶¶ 423, 426, 433; AT&T Reply Comments 39-40 & nn. 155-59 (citing, *inter alia*, other Orders).

[33] *Michigan 271 Order* ¶ 386.

[34] *Id.* ¶ 397.

and will remain, open to competition,"[35] including, for example, adopting penalty plans to prevent anticompetitive conduct.

State commissions have routinely addressed the public interest in their comments on BOC 271 applications. Most state commissions have included some assessment of the public interest, and many have addressed the public interest factors in their particular State at length.[36] Their findings that, given competitive and other conditions in their states, 271 approval would serve the public interest, contrast sharply with the findings of the CPUC.

For example, "after monitoring the local market for more than six years and after considering an extensive record to evaluate BellSouth's compliance with the requirements of Section 271, the [Georgia Public Service] Commission [reported to this Commission that it] ha[d] found that Bell South has . . . irrevocably opened its local market in Georgia to competition."[37] The Georgia PSC reported that the "level of competitive activity in the local marekt in Georgia is impressive and is continuing to grow," and that "even residential competition . . . is firmly in place in Georgia and will only continue to flourish."[38] The Louisiana Commission also addressed a number of public interest factors, and similarly concluded that "there is simply no question that this additional competition [from interLATA authorization] is in the public interest."[39] This Commission approved BellSouth's application,

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[35] *Michigan 271 Order* ¶ 386.

[36] *See, e.g.*, Written Consultation of the Missouri Public Service Commission, CC Docket No. 01-88 (filed April 18, 2001) at 89 "this [state] Commission is uniquely situated to evaluate the probable effects of SWBT's potential entry into the interLATA market in Missouri"); *id.* (concluding that "SWBT's interLATA entry would serve the public interest"); *id.* at 87 (citing economists' testimony in state 271 proceedings "that SWBT's entry into the long-distance market will likely help drive the rates paid by residential and small-business consumers closer to the costs of providing service"); *id.* ("SWBT has no ability to impede long distance competition"); Report of the State Corporation Commission of the State of Kansas On SWBT's Compliance with Section 271, CC Docket No. 00-217 (filed 11/20/00) at 36 ("the [state] Commission will examine the public interest issue"; noting Staff Report concludes that "benefits will accompany SWBT's entry into the long distance market"; *id.* at 36-39 (addressing pricing impact, market share, access charges, rural service, expedited dispute resolution, and other public interest issues); Evaluation of the Massachusetts Department of Telecommunications and Energy, CC Docket No. 00-176 (filed Oct. 16, 2000) at 655-62 (finding that "approval of VZ-MA's application is in the public interest", and discussing extent of local competition, "safeguard" against backsliding, "expedited dispute resolution," and impact on "long distance consumers"); Report of the Maine Public Utilities Commission on Verizon Maine's Compliance with Section 271, CC Docket No. 02-61 (April 10, 2002), at pp. 79-114 (discussing public interest standard and issues); *see id.* at 81 (summarizing "four distinct public interest concerns raised in our proceeding").

[37] Comments of the Georgia Public Service Commission, In the Matter of Joint Application by BellSouth Telecommunications, Inc., et al., for Authorization to provide In-Region, InterLATA Service in the states of Georgia and Louisiana pursuant to Section 271 of the Telecommunications Act, CC Docket No. 01-277, (filed 11/05/01), at 222; *see id*. at 216-22 (discussing issues related to the public interest).

[38] *Id.* at 222.

[39] Evaluation of the Louisiana Public Service Commission, In the Matter of Joint Application by BellSouth Telecommunications, Inc., et al., for Authorization to provide In-Region, InterLATA Service in the states of Georgia

and acknowledged at the outset that "[w]e rely heavily in our examination of this application on the work completed by the Georgia and Louisiana Commissions."[40]

By contrast, the CPUC painted a far different picture of the status of local competition, and of SBC Pacific's progress, in its public interest review. It reported that "Pacific's less than complete progress has given California technical, not actual, local telephone competition,"[41] and concluded that it "fores[aw] harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long distance dominance to match its local influence."[42]

The contrast between the Texas and California public interest evaluations is equally dramatic. The Texas Public Utilities Commission ("TPUC") reported that it "has used the public interest requirement to review whether other relevant factors exist that would frustrate the intent of Congress that markets be open."[43] The TPUC first found the "state of competition"[44] to be "robust."[45] The TPUC then stated that it had required SWBT to produce not "paper promises" but "a proven track record" that "SWBT had in place the mechanisms that would ensure that the local market [would] remain open after SWBT's long distance entry."[46] In that regard, the TPUC discussed at length SWBT's performance remedy plan,[47] which it found "would disincent anti-competitive behavior by setting the damages and penalties at a level above the cost of doing business,"[48] and "will *prevent any anti-competitive behavior*."[49]

This Commission again relied heavily and expressly on these findings in approving SBC's Texas application. The Commission acknowledged, for example, that "[s]everal commenters offer specific allegations that SWBT has engaged in anti-competitive behavior."[50] Although the Commission emphasized "that grant of this application *does not*

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and Louisiana pursuant to Section 271 of the Telecommunications Act, CC Docket No. 01-277, (dated 10/19/01), at 92; *see id.* at 91-96.

[40] Georgia / Louisiana 271 Order ¶ 5.

[41] *CPUC 2002 271 Decision* at 268.

[42] *Id.* at 264.

[43] Evaluation of the TPUC, In the Matter of Application of SBC Communications Inc. et al. for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-4 at 98 (filed Jan. 31, 2000).

[44] *Id.* at 101; see *id.*. at 99-103 & nn. 557-87.

[45] *Id.* at 101.

[46] Id. at 98.

[47] *Id.* at 103-11 & nn. 588-639.

[48] *Id.* at 106.

[49] *Id.* at 111 (emphasis added).

[50] *Texas 271 Order* ¶ 431.

reflect any conclusion that SWBT's conduct in the individual instances cited by commenters is nondiscriminatory and complies with the company's obligations,"[51] it concluded that these "various incidents" did not "constitute a pattern of discriminatory conduct that undermines our confidence that SWBT's local market is open to competition."[52] Significantly, the Commission found that the "Texas Commission was aware of the need to fashion a remedy plan that produced . . . sufficient disincentives for SWBT to engage in anti-competitive behavior after section 271 relief is granted," and "conclude[d that] the Texas Commission established a performance remedy plan that would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business."[53] The Commission rejected CLEC "criticisms" that the plan was too lenient, because "[w]e find it significant that the Texas Commission considered and rejected most of these arguments."[54]

The CPUC, by contrast, not only found local competition "anemic" rather than "robust," but expressed great concern about SBC Pacific's unchecked anticompetitive behavior and evident willingness to persist in it notwithstanding having paid millions of dollars in fines for noncompliance. For this reason, the CPUC could not make a comparable finding to that of the TPUC that "'there is no anticompetitive behavior by the'" BOC.[55]

For example, the CPUC rejected SBC's view that the complaints about anticompetitive conduct are not serious, and "that the competitors have collected a series of past occurrences, anecdotal complaints and disgruntled policy views"; it found instead "that the record contains more than that."[56] The CPUC discussed "two federal court proceedings" that "present[ed] findings of anticompetitive conduct."[57] It also observed that new rules were needed "to protect customers from [Pacific's] abusive marketing practices," including those as "described by a CLEC witness."[58] Finally, the CPUC expressed not confidence but concern about the efficacy of the "performance incentive plan" at preventing anticompetitive behavior, noting that "Pacific was silent as to the inference that we should take from the millions of dollars

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[51] *Id.* ¶ 431 n.1265 (emphasis in original).

[52] *Id.* ¶ 431.

[53] *Id.* ¶ 423 & nn.1233, 1234 (citing "Texas Commission Texas I Evaluation at 106").

[54] *Id.* ¶ 426 & n.1247 (citing "Texas Commission Texas I Comments at 106-11" and also citing "*Bell Atlantic New York Order,"* 15 FCC Rcd at 4120-71, para. 440," where Commission similarly relied on the New York Commission.

[55] *CPUC 2002 271 Decision* at 252 (*quoting* Cal. Pub. Util. Code § 709.2); *id.* at 252-58 (ALJ/JAR/tcg), and 251-52 (COM/GFB,JAR/tcg).

[56] *Id.*at 256 (ALJ/JAR/tcg).

[57] *Id.* at 254-56 (ALJ/JAR/tcg).

[58] *Id.* at 257 (ALJ/JAR/tcg).

that SBC's affiliates have paid to the FCC for variously failing to meet the required performance obligations under the Ameritech Merger Conditions."[59]

In short, where the TPUC was confident that its Performance Remedy Plan "will prevent any anticompetitive behavior" by SBC's affiliate in Texas, the CPUC was expressly unable to make that same finding. This application, therefore, starkly raises the questions whether, in the 90-day period afforded by law, this Commission can be "satisfied on the basis of an adequate factual record" that the CPUC's concerns about the public interest are so unwarranted that this Commission should reject them,[60] whether SBC Pacific has in fact "undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition,"[61] and whether there is no "pattern" of "discriminatory or anti-competitive conduct" or failure "to comply with state and federal telecommunications regulations,"[62] such that SBC has proven that interLATA authorization is in the public interest.

The answer to these questions is clear: the Commission does not have an adequate factual record to support a rejection of the CPUC's views. To the contrary, the record here forecloses such a result. Whereas the Commission, as of June 30, 2000, did not find any "pattern" in the "various incidents" of discriminatory conduct presented in the Texas 271 record, here the CPUC has overwhelming evidence of such a pattern. In imposing on SBC Pacific a then-record $25.5 million fine (on September 20, 2001) for marketing abuses, the CPUC stressed that the BOC's "serious violations" of law were "compounded by the fact that Pacific Bell [previously] engaged in similar conduct" where it was fined $16.5 million.[63] The CPUC then approved an even larger $27 million fine for conduct that included failing accurately to report – by an order of magnitude -- to the CPUC the thousands of customer complaints it received about its DSL service.[64] It received only "silence" from SBC regarding its concerns that fines have not deterred SBC from violating its Ameritech merger conditions. It has now received an audit report from a consultant that the CPUC retained that demonstrates that the CPUC has, if anything, underestimated SBC Pacific's intent and ability to cross-subsidize its long-distance

[59] *Id.* at 252 (COM/GFB, JAR/tcg).

[60] *See Michigan 271 Order* ¶¶ 30, 386.

[61] *Id.* ¶ 386.

[62] *Id.* ¶ 397.

[63] See AT&T Comments at 77-78 & nn. 246-49 (citing CPUC Marketing Practices Decision); AT&T Reply Comments at 43 n.171. SBC notes that the $25.5 million fine was later "reduced" to a mere $15.225 million, and continues to argue its case against the penalty even now, claiming that it "agrees" with dissenting commissioners who allegedly thought that the fines were "too harsh" and "unwarranted." Batongbacal Reply Aff. ¶¶ 8, 9. As noted below, SBC's unwillingness even now to accept responsibility for its marketing abuses underscores the validity of the CPUC's concerns that fines are not enough to deter future SBC misconduct.

[64] See AT&T Comments at 76 & nn 242-44 (SBC Pacific reported zero complaints and eight complaints during periods when it was receiving thousands).

affiliate, and finds that such cross-subsidies are already occurring on a massive scale.[65] It bemoaned SBC's "delaying tactics" that denied it the ability to set cost-based UNE rates,[66] and now confronts an incumbent with an avowed strategy of threatening deep job cuts in states that refuse to raise UNE rates to levels that preclude use of the platform – as SBC has already announced it will seek in California.[67] The CPUC thus has every reason to be concerned – and no evidentiary basis to alter its view – that SBC will not be deterred by the threat of mere regulatory fines from continuing to act anti-competitively to undermine both local and long distance competition in California.

The record before this Commission further contains this Commission's record $6 million fine against SBC for denying competitors access to shared transport for intraLATA toll service – a fine levied because SBC "willfully and repeatedly" violated a key merger obligation by "forc[ing] competing carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport."[68] The premise of the *Forfeiture Order* was thus a finding of *repeated* anticompetitive conduct. That pattern, moreover, continues in the record of SBC Pacific's conduct in this application. As AT&T has described, SBC is now forcing competing carriers throughout its region, including in California, to "expend time and resources in state proceedings trying to obtain" yet another unbundled network that "SBC was already obligated to offer," namely UNE-combinations. *SBC Forfeiture Order* ¶ 24; see AT&T Reply Comments 42.

Indeed, the pattern may extend even to the failure to provide competing carriers in California with shared transport for intraLATA toll service. As explained in the attached declaration of Eva Fettig, SBC may not validly rely upon the terms of AT&T's interconnection agreement as evidence that it makes shared transport available for intraLATA toll service. The ASR that SBC has issued to implement the interconnection agreement provision on which SBC relies require the purchase of dedicated transport between end-offices, thus defeating SBC's claim that it has made shared transport available through AT&T's contract.[69] SBC also published an Accessible Letter on October 15, 2002 purporting to make shared transport available for intraLATA toll through a new ICA Amendment, but at least one carrier (Telscape) has since reported (in its ex parte submissions and reply comments) that SBC has not made shared transport available to it, notwithstanding the Accessible Letter, and the proposed ICA Amendment on its face raises questions about whether SBC has yet met its obligation to make

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[65] *See* AT&T Comments at 57-59 & nn. 184-91; AT&T Reply Comments at 43.

[66] *CPUC 2002 271 Decision* at 124.

[67] *See* Letter from C. Shenk to M. Dortch (filed November 26, 2002) at 3-4 and n. 6 ("*AT&T pricing ex parte*) (providing sources).

[68] Forfeiture Order, *SBC Communications, Inc., Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, FCC 02-282 (rel. Oct. 9, 2002) ¶ 1, 24 ("*SBC Forfeiture Order*").

[69] Declaration of Eva Fettig ¶¶ 2, 4-6.

shared transport available in California for intraLATA toll service.[70] The record thus contains unresolved and serious questions, beyond SBC's continuing and frivolous litigation of its Supreme Court rejected UNE-combination arguments, about SBC's willingness to conform its conduct toward competitors to the dictates of established law.

SBC's recent submissions to this Commission do nothing to break the pattern. SBC does not withdraw its position on new combinations. It does not acknowledge its duplicity with respect to its non-provision of shared transport for intraLATA toll under the AT&T interconnection agreement. It does not pledge to implement the CPUC's joint marketing guidelines, or to correct the cross-subsidization of Pacific's affiliates. It does not accept the findings of the CPUC concerning prior violations of law and anticompetitive conduct, or describe strict new internal and verifiable controls that will preclude any recurrence. Rather, it takes the same position here that the CPUC rejected in the state proceedings – that all of the concerns are overblown and merit only evasion and denial. SBC continues, as it did before the CPUC, to adopt a posture of defiance and denial that, given all that has transpired, can only mean that fines are not enough for it get the message.

SBC ignores its $6 million fine, even though it was for "willfully and repeatedly" violating its shared transport obligations *this year*. It also ignores the public interest implications of its concerted effort to raise rivals' costs by threatening to cut off access to UNE combinations, excusing this misconduct as the mere adoption of a "negotiating position."[71] SBC brushes off the CPUC's concerns about anticompetitive conduct as evidenced in litigation with competitors as the CPUC just misreading the cases.[72] The evidence of its abuse of its position as PIC Administrator that led the CPUC to order its investigation is similarly waved off as misguided over-regulation.[73] The serious concerns about massive cross-subsidization of SBC's long distance affiliate by Pacific (through hundreds of millions of dollars of free brand promotion and customer acquisition information) are not denied, but are derided because the consultant selected by the CPUC is not, in SBC's view, an auditor qualified to raise such concerns.[74] SBC's $27 million fine for failing to report tens of thousands of customer complaints to the CPUC is described as mere "confusion" resulting from a change of affiliates[75] (that, SBC omits to remind us, was designed to help evade its resale obligation). Its $25.5 million fine for repeated marketing abuses is said by SBC to be really not so bad, both because it was later "reduced" to

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[70] *Id.* ¶ 7.

[71] SBC Reply Comments at 36.

[72] Batongbacal Reply Decl. ¶¶ 11, 12.

[73] SBC Reply Comments at 40-41.

[74] SBC Pacific Reply Comments at 54; see Letter from M. Haddad to M. Dortch (Nov. 26, 2002) ("*AT&T Public Interest/272 ex parte letter*") at 7-9.

[75] Batongbacal Reply Aff. ¶ 4.

$15.5 million, and because SBC "agrees" with dissenting commissioners who allegedly thought that the fine was too "harsh."[76]

Indeed, lest there be any doubt about SBC's intransigence, it is dispelled in the concluding paragraph of its Reply Declaration entitled "Regarding Allegations of Misconduct": "Most importantly, the foregoing complaints and allegations by the commentors are a 'red herring.' None of these matters have anything to do with (a) Pacific's compliance with the "competitive checklist" or (b) how Pacific will interact with its long distance affiliate or other unaffiliated long distance carriers. Moreover, almost all the claims relate to allegations that are many years old. . . . Accordingly, these irrelevant allegations should be disregarded."[77] In short, rather than take responsibility for its misdeeds, correct all it can, and establish rigorous and enforceable measures to prevent repetition such that regulators and competitors can be confident that the anticompetitive and unlawful conduct will cease, SBC urges this Commission to look the other way. In that respect, SBC's comments upon SBC's anticompetitive and unlawful conduct contribute to the pattern.

In truth, the Commission could validly "disregard" SBC's extraordinary record only by repudiating its prior findings (in, *e.g.*, the *Michigan 271 Order* and *Texas 271 Order*) that a pattern of misconduct is directly relevant to the public interest. On this record, the Commission has no adequate factual record to override the CPUC's findings that this BOC has not demonstrated that mere financial penalties and prospect of future audits will prevent it from violating the law, or that local competition is irreversibly established. This Commission also lacks an adequate record to overturn the state's findings that the applicant's incentive and ability to abuse its continuing monopoly power are not yet adequately checked, that its local markets are not yet irreversibly open, and interLATA authorization may harm long-distance competition.

In summary, to grant an application from the state with the nation's largest economy with these obvious and acknowledged defects would set a dangerous and unwarranted precedent. It would signal to BOCs and state commissions that the "complete-when-filed" rule is dead, and that BOCs may submit premature applications to this Commission with state-verified checklist non-compliance and a wink-and-a-nod to this Commission that the BOC expects to solve the problem over the next 90 days. It would also constitute acquiescence in SBC's view that patterns of anticompetitive conduct, even if acknowledged by regulatory bodies, are "irrelevant" to the public interest, and that state findings concerning the public interest will be heeded only if they conclude that entry is in the public interest. There is no legitimate basis for such radical changes in the Commission's implementation of the law. SBC Pacific's 271 application for California should be denied.

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[76] *Id.* ¶¶ 8, 9.

[77] *Id.* ¶ 13 (emphasis added).

Respectfully submitted,

/s/ Mark E. Haddad
Mark E. Haddad

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Application of SBC Communications, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in California	)	WC Docket No. 02-306

DECLARATION OF EVA FETTIG

1. My name is Eva Fettig. I am District Manager of Production Support and Supplier Management in AT&T's Local Services and Access Management, SBC Region. My business address is 795 Folsom Street, San Francisco, California. As District Manager for AT&T's Production Support and Supplier Management in the SBC Region Local Services and Access Management Organization, I work on a number of UNE-L, UNE-P, LNP and billing activities for our Consumer, Business, and Broadband organizations. I am involved in negotiating interconnection agreements and analyzing any of SBC's local regulatory filings, including 271 applications. I lead a team whose mission is to project manage ordering, provisioning, and maintenance processes where products are leased from SBC. In 1989, I received a Bachelor of Science degree from the University of Vermont. I majored in Marketing and had concentrations in Finance and Mathematics. In 1994, I received a Master of Business Administration degree from the University of Illinois at Urbana - Champaign. I concentrated in Strategy and Marketing.

2. The purpose of this declaration is to respond to Pacific's claim in its reply comments and in a supporting declaration that the terms of AT&T's interconnection agreement provide a method to obtain shared transport for intraLATA toll service. Pacific's claim is false. The ASR that Pacific has issued to implement the interconnection agreement provision on which Pacific relies requires the purchase of *dedicated* transport between end-offices, thus defeating any claim that Pacific has made shared transport available through that contract. In addition, the generic amendment to interconnection agreements that Pacific has proposed fails to address the problem of shared transport for intraLATA toll traffic. That amendment expressly provides that carriers purchasing shared transport also pay for access services associated with the intraLATA traffic. That requires carriers to pay twice for the same functionality, and renders the amendment useless as a practical matter.

3. Telscape, a CLEC in California, claimed that Pacific "repeatedly has refused to facilitate Telscape's request to carry UNE-P intraLATA toll calls using shared transport, in direct violation of its obligations under checklist item v."[1] Telscape also noted that SBC had been fined $6 million for violating a condition of its merger with Ameritech because it had refused to make shared transport available for use for intraLATA toll calls.[2]

4. In its Reply Comments and in a supporting declaration by Colleen L. Shannon, Pacific claims that it "offers shared transport for intraLATA toll in accordance with the order of

[1] Reply Comments of Telscape Communications, Inc., at 5-6 (Nov. 4, 2002); *see also* Letter from Ross Buntrock to Marlene Dortch (filed Oct. 24, 2002); Letter from Ross Buntrock to Marlene Dortch, at 4-5 (filed Oct. 18, 2002).

[2] Telscape Reply Comments at 6 (citing *SBC Comm. Inc. Apparent Liability for Forfeiture*, File No. EB-01-1H-0030, (rel. Oct. 9, 2002).

the California PUC in the AT&T arbitration."[3] Ms. Shannon claimed that "Pacific's interconnection agreements consistent with the CPUC's determination."[4] Thus, Pacific attempts to rely on the AT&T interconnection agreement as the grounds for its claim that it complies with its obligation to provide shared transport for use with intraLATA toll service. In addition, Pacific also claims that it "recently offered CLECs in California an amendment that permits them generally to use shared transport for intraLATA toll in conjunction with unbundled switching."[5]

5. In the CPUC's arbitration order for the AT&T-Pacific interconnection agreement, the CPUC determined that "AT&T cannot use Pacific's shared transport UNE to carry its intraLATA toll traffic, except in one instance."[6] Because "shared transport is technically inseparable from unbundled switching," the CPUC found that competing "carriers do not have the option of using unbundled shared transport without also using Pacific's unbundled local switching."[7] Thus, the CPUC required Pacific to provide shared transport "where AT&T buys unbundled switching from Pacific and implements custom routing Option C."[8] Option C of the AT&T-Pacific interconnection agreement provides that "[u]nder this Option C, Pacific shall

[3] Reply Comments of Pacific Bell, at 62 (filed Nov. 4, 2002); Reply Aff. of Colleen L. Shannon, ¶ 14 (filed Nov. 4, 2002).

[4] *Id.* ¶ 15.

[5] Reply Comments of Pacific Bell at 63 & Shannon Reply Aff. ¶ 15 & Att. A & B (accessible letter and interconnection agreement amendment).

[6] Opinion, *Application Of AT&T Communications of California Inc. et al. for Arbitration*, D.00-08-011, at 8 (Cal. PUC Aug. 3, 2000) (submitted with Pacific Application at App. C, Tab 64).

[7] *Id.*

[8] *Id.*

route AT&T's intraLATA traffic over Pacific Shared Transport facilities if requested by AT&T."[9]

6. However, Pacific is not complying with this obligation set forth in Option C, and thus neither AT&T nor any other carrier can use that contract to obtain shared transport for intraLATA toll traffic. As the attached documents from the CLEC Handbook show, the procedures for ordering Option C require customized Routing.[10] Customized routing, in turn, requires the CLEC to order a dedicated DS1 to each switch that it wants to request custom routing. There are no ASR ordering procedures developed and implemented on Pacific's website that will allow the ordering of custom routing with *shared* transport, only *dedicated* transport.[11]

7. In addition to relying on AT&T's interconnection agreement, SBC also relies on an accessible letter (issued well after SBC's application was filed) that offers CLECs an amendment to their interconnection agreement on shared transport. However, that amendment does not provide a realistic method of obtaining shared transport for use with intraLATA toll traffic. As Paragraph 5 of that amendment provides, the "CLEC is and will remain solely liable and responsible for any terminating compensation charges applicable" to the intraLATA traffic, including "terminating access charges payable to Pacific (beginning with the trunk side of Pacific's terminating end office) and to third party carriers." *See* Attachment B, ¶ 5, Shannon

[9] AT&T Pacific Interconnection Agreement, Attachment 6 (UNEs) ¶ 6.5.3.

[10] CLEC Handbook, "Customized Routing Option B/C, Option C (Oct. 13, 1999) (attached as Exhibit 1 hereto).

[11] In fact, AT&T does *not* order shared transport from Pacific, in large part because Option C requires the purchase of dedicated transport. In addition, SBC's policy would require AT&T to establish compensation arrangements with numerous carriers in California handling intraLATA toll traffic that transits SBC's network, which would be an enormous undertaking give the large number of carriers in California.

Reply Aff. Thus, after ordering and incurring charges for the shared transport provided by Pacific (*see id.* ¶ 3), it appears that the CLEC would nevertheless still be required also to pay Pacific or other carriers for access charges for traffic carried on the shared transport facility. In those circumstances, there is no financial benefit to the CLEC to pay both for shared transport and for switched access. Accordingly, the amendment offered by Pacific is largely a meaningless offer.

8. Thus, despite the Order of the CPUC requiring Pacific to provide shared transport to carry intraLATA toll traffic, Pacific's procedures have been implemented in a way that makes it impossible for CLECs to submit an ASR and use Pacific's shared transport under Option C custom routing. Further, the amendment to its interconnection agreement offered by Pacific is no solution at all, because it provides that CLECs will pay for access even where they order shared transport.

I, Eva Fettig, declare under penalty of perjury that the foregoing is true and correct.

/s/ Eva Fettig

Eva Fettig

Executed on November 26, 2002.